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No. 234

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CONTINENTAL OIL COMPANY, *Petitioner,*

v.

STEWART L. UDALL, Secretary of the Interior,
PHILLIPS PETROLEUM COMPANY and
AZTEC OIL & GAS CO., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS PHILLIPS PETROLEUM COMPANY AND AZTEC OIL & GAS CO.

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QUESTIONS PRESENTED

1. Whether the Secretary of the Interior erred in denying petitioner permission to drill on certain Indian lands on the ground that the land was not within petitioner's leases but rather within the leases of these respondents.

2. Whether an administrative determination not required by statute or by the Constitution to be made on

a formal evidentiary record, and with respect to which petitioner never requested a trial-type hearing, was vitiated by the administrator's consideration of certain not reasonably disputable background facts.

STATUTES AND REGULATIONS INVOLVED

Act of May 11, 1938, § 4, 52 Stat. 348, 25 U.S.C. § 396d, provides in pertinent part:

> "All operations under any oil, gas, or other mineral lease issued pursuant to the terms of any act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior."

25 C.F.R. § 171.8 (1967) provides:

> "The area covered by a lease shall be in a reasonably compact body and shall conform to the system of public-land surveys * * * ."

STATEMENT

This action was instituted by petitioner in the United States District Court for the District of Columbia to review a decision of the Secretary of the Interior affirming an administrative refusal of permission to petitioner to drill for oil on a certain tract of land. The refusal was based on a determination that the land was not covered by two Navajo Tribal leases acquired by petitioner at a lease sale administered by the Department of the Interior. That determination was, in turn, based on a finding that contrary to petitioner's claim, those leases properly construed conveyed the lands described therein by sections, in accordance with the system of public-land surveys, and not according to conflicting metes and bounds descriptions, also found in the leases.

Respondents Phillips Petroleum Company ("Phillips") and Aztec Oil & Gas Co. ("Aztec") are the joint owners of two Tribal leases which lie directly to the north of petitioner's leases and which would be encroached upon if petitioner's claim were to prevail. Phillips and Aztec were granted leave to intervene in this action in the District Court as parties defendant. (J.A. 50).

The District Court, after extensive briefing and argument by the parties, dismissed the action on the merits, concluding that the Secretary's decision "is not arbitrary or capricious, does not constitute an abuse of discretion and is not otherwise unlawful" and "is supported by substantial evidence on the administrative record." (J.A. 166). On petitioner's appeal, the judgment of dismissal was affirmed per curiam without opinion. (Pet. App. A-1). Petitioner's petition for rehearing was denied. (Pet. App. A-2).

The leases involved in this action came into being as a result of an advertisement for bids for oil and gas leases on 214 tracts of Navajo Tribal Lands which was issued by the Department of the Interior in March, 1953. (J.A. 16-28). The advertisement stated that "each lease will be issued to the highest responsible qualified bidder in accordance with the Act of May 11, 1938 (52 Stat. 347), and the regulations approved May 31, 1938, as amended or supplemented (25 C.F.R. Part 186)."[1] (J.A. 17). Section 2 of the Act of May 11, 1938, 25 U.S.C. § 396b, provides that such leases are to be offered for sale to the highest bidder "upon such terms and subject to such conditions as the Secretary of the Interior may prescribe." (Pet. 3). Section 4

[1] These regulations are now Part 171 of 25 C.F.R.

of the Act, 25 U.S.C. § 396d, provides that operations under these leases "shall be subject to the rules and regulations promulgated by the Secretary of the Interior." And one of the regulations issued by the Secretary (now 25 C.F.R. § 171.8) provides that "the area covered by a lease * * * shall conform to the system of public-land surveys * * * *."

Among the 214 tracts referred to in the advertisement were Tracts 87, 88, 96 and 97. All of these tracts were described by metes and bounds, and the description then concluded (for Tract 88; the description of the other tracts being in the same form):

> "Tract No. 88 when surveyed probably will be described as follows:
>
> "Sections 29, 30, 31 and 32 of T. 41 S., R. 24 E., S.L.M., and containing a total of approximately 2560 acres." (J.A. 25; see J.A. 24-25, 26-27, 27).

The advertisement further stated that the following conditions, among others, "will be incorporated in the leases":

> "1. This land is offered on a tract basis and the bids shall not be on an acreage basis. The acreage herein stated is for the sole purpose of computing annual rental prior to survey of the land. Thereafter the rental shall be computed on the acreage as shown by the survey. * * *
>
> "2. Prior to the commencement of the drilling of a well the lessee shall have the leased premises surveyed by a registered land surveyor, boundaries posted with substantial monuments, and a tie established with the nearest United States Public Land Survey. Certified copies of the survey plats must be filed in duplicate with the Area Director, Window Rock, Arizona, and in duplicate with the Supervisor, U.S. Geological Survey, P. O. Box 997,

> Roswell, New Mexico. Failure to comply with this provision will render the lease subject to cancellation in the discretion of the Commissioner of Indian Affairs. Permission to drill will not be granted by Supervisor prior to receipt of certified copy of survey plat." (J.A. 18-19).

Petitioner was the successful bidder for leases on Tracts 88 and 97, and the predecessor of Phillips and Aztec was the successful bidder for leases on Tracts 87 and 96. (J.A. 5, 6, 52, 53). Each lease, as finally entered into between the lessee and the Navajo Tribal Council and as approved by the Department of the Interior, described the land covered by the lease in the same manner as it had been described in the advertisement and contained the conditions which the advertisement stated would be incorporated in the leases. (J.A. 34-37, 98-99, 102-03). In addition, each lease contained an agreement by the lessee "to abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases." (J.A. 109-10).

Before these leases were approved, an official public-land survey of the area was made by the Bureau of Land Management.[2] This survey, which was paid for by a group of oil companies, including petitioner (J.A. 12), was performed "under special instructions for Group 386, Utah, dated July 28, 1953." (J.A. 163). These instructions stated that "the purpose of the work is to provide official township boundary surveys to facilitate subsequent identification of individual leases

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[2] Petitioner's leases were approved on December 10, 1953 (J.A. 5, 52), and the leases of Phillips and Aztec's predecessor were approved on January 8, 1954. (J.A. 6, 52-53). The survey was conducted from August 7 to November 3, 1953. (J.A. 163).

on the ground." (J.A. 160). The instructions clearly showed that the lower tier of sections in the tracts for which petitioner had been the successful bidder would be fractional sections and would not coincide with the metes and bounds descriptions of the tracts. (J.A. 161-62).

This official survey was approved on May 10, 1954. (J.A. 163). Thereafter, pursuant to condition number 2 of the leases (pp. 4-5, *supra*), petitioner filed surveys of the tracts of land which it had leased. (J.A. 76, 77). These surveys, which conformed to the approved Bureau of Land Management survey of township boundaries, stated on their face that they were of Tracts 88 and 97, showed that the boundaries of these tracts were based on the section description in the leases and made no mention of the metes and bounds descriptions of the tracts. (*Ibid.*). On the basis of these surveys, petitioner was granted permission to drill certain wells. (J.A. 45).

In August, 1957, however, petitioner reversed its position as to the area covered by its leases and filed a plat which purported to represent the survey of the metes and bounds description in the leases. (J.A. 9-10, 78). Petitioner then requested permission to drill a well on land which it claimed to be within this metes and bounds description. (J.A. 10). This request was denied by the Regional Oil and Gas Supervisor, which denial was upheld by the Area Director (J.A. 39), on the ground that the well would not be located on land covered by petitioner's leases but rather on land included within these respondents' leases. (J.A. 85-86). Phillips as operator was granted permission to drill on this land. (J.A. 84).

Petitioner appealed from these rulings to the Commissioner of Indian Affairs (J.A. 61-63), who ruled against petitioner. (J.A. 90-95). An appeal was then taken to the Secretary, who affirmed the decision of the Commissioner, holding that the section description in petitioner's leases was controlling over the metes and bounds description because the former description conformed to the system of public-land surveys, as required by 25 C.F.R. § 171.8, whereas the latter description did not; because certain conditions in the leases could be given meaning only if the section description controlled; and because petitioner had displayed by its actions a recognition that its land was leased by section numbers. (J.A. 38-46).

Petitioner's challenge to this administrative determination of the Secretary was rejected by the courts below, and petitioner now seeks the intervention of this Court.

ARGUMENT

The Regional Oil and Gas Supervisor, U.S. Geological Survey, the Area Director of Indian Affairs, the Commissioner of Indian Affairs, the Secretary of the Interior, the District Court and the Court of Appeals, after having given full consideration to petitioner's claim, have all rejected that claim. It does not warrant review by this Court.

Petitioner does not contend that the judgment of the Court of Appeals is in conflict with any decision of any other court. This case presents no novel or important question of law. It has no impact whatever upon the administration of the mineral leasing statutes by the Department of the Interior. It does not touch upon the Department's responsibilities vis-a-vis the Indians

whose lands are leased.[3] As petitioner states, "The issue presented to the Secretary in this case was simply the construction of an oil and gas lease." (Pet. 8). Whether or not that construction was valid—and it clearly was—it is manifestly not a question meriting this Court's attention.

Petitioner, in asking this Court to review the Secretary's decision, claims that the Secretary did not apply "recognized legal standards" in resolving the controversy (Pet. 8) and also that the Secretary based his decision on material that should not have been included in the administrative record. There is no basis for either claim.

1. It is difficult to comprehend precisely the nature of petitioner's first complaint. Certainly, petitioner's statement that "the Secretary, in reaching his decision, exercised his decision-making function rather than his judicial function" (Pet. 10) is of no help. Basically petitioner seems to be complaining that the Secretary's decision was unlawful because, it is claimed, while the Secretary purported to apply legal standards, he did not in fact do so but instead exercised his discretion in resolving the controversy. In support of this conten-

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[3] The Navajo Tribal Council, with whom petitioner entered into the leases, was not named as a party defendant, nor did it seek to become a party to this action. The revenues to be derived by the Council from the leases do not depend upon whether the land involved here is held to be encompassed within petitioner's or Phillips-Aztec's leases.

As stated by petitioner, "The lands involved are under lease to either Petitioner or Phillips-Aztec and neither the Navajo Tribe nor the United States has any interest in the subject matter of this controversy." (Pet. 11).

tion, petitioner cites (a) the Secretary's statement that the lease "has more elasticity" than petitioner claimed (J.A. 43), (b) the fact that reference was made in the Secretary's opinion to matters that occurred after the lease sale which demonstrated that petitioner recognized that the land was leased in accordance with the section description, and (c) the statement in the opinion as to the agency's intent that the leases conform to the requirements of applicable regulations. We are at a loss to understand how these statements can be said even to suggest that the Secretary's decision was in any way improper.

Far from the Secretary's decision being unreasonable or lacking support,[4] it is not an overstatement to say that any other decision would have been unthinkable. First of all, the decision was compelled by the fact that only if the section description controlled would the leases conform to the regulations referred to in the advertisement, and by which the lessee specifically agreed to abide, that "the area covered by a lease * * * shall conform to the system of public land surveys * * * ." (25 C.F.R. § 171.8). This mandatory regulation is binding not only on the lessee but on the Secretary as well. *See, e.g., Vitarelli* v. *Seaton,* 359 U.S. 535, 539-40; *Service* v. *Dulles,* 354 U.S. 363. *See*

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[4] The standard governing review of the Secretary's decision is that set forth in the Administrative Procedure Act, the statute under which this action was brought. (J.A. 3). Under § 10 of the APA (now 5 U.S.C.A. § 706 (Spec. Supp. 1966)), that standard is whether the "action, findings, and conclusions" of the Secretary are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This is the standard applied by the District Court. (J.A. 166).

also Chapman v. *Sheridan-Wyoming Coal Co.*, 338 U.S. 621, 629 (dictum). Once having determined that the regulation was applicable—a determination that can be overturned only if unreasonable, not merely if incorrect, *see Udall* v. *Tallman*, 380 U.S. 1, 4; *Chapman* v. *Sheridan-Wyoming Coal Co., supra*—the Secretary was not only free to follow the regulation but would have erred in disregarding it. It is untenable for petitioner to suggest that the Secretary's reliance on the intent to comply with the regulation was improper.

Second, the Secretary relied on the fact that the advertisement and leases, in addition to describing the land by metes and bounds, contained conditions stating that the land was offered on a tract and not an acreage basis and requiring that a survey be taken to establish a "tie * * * with the nearest United States Public Land Survey." These conditions and the requirements of the regulations, said the Secretary, would be meaningless under petitioner's view of the leases. (J.A. 43). On the basis of this determination, clearly a matter within the administrative expertise of the Interior Department, the Secretary concluded that the lease could not be viewed, as petitioner claimed, as an unambiguous conveyance by metes and bounds. How this conclusion is in any way erroneous or improper is not explained by petitioner.

Finally, the Secretary relied on petitioner's recognition, after the leases had been entered into, that the land had been leased to it by section designation and not by metes and bounds. The Secretary also noted that petitioner had acted to its benefit in accordance

with its original view as to the boundary of its leases.[5] The Secretary clearly did not err in relying on a party's own practical construction of the lease; courts traditionally have done so. *See, e.g.*, 3 Corbin, *Contracts* § 558 (1960); 4 Williston, *Contracts* § 623 (3d ed. 1961); *Iselin* v. *C. W. Hunter Co.*, 173 F.2d 388, 392 (5th Cir. 1949); *Midwest-Radiant Corp.* v. *Hentze*, 171 F.2d 635, 638 (7th Cir. 1948), *cert. denied*, 336 U.S. 952.

Each of the foregoing three grounds of decision would itself be sufficient to support the Secretary's determination. Together, they render that determination unassailable.

2. Petitioner's second claim is that the administrative record should have been limited to pleadings and evidence and that the briefs of the parties and staff memoranda were erroneously relied upon by the Secretary. This contention makes no sense in the circumstances of this case.

Petitioner does not contend that the Secretary of the Interior was required to conduct a formal quasi-judicial evidentiary hearing in this case. Such a hearing was not required by any statute or regulation. Instead, the administrative determination was made after the opportunity had been given to all interested parties to submit informally any facts, data, or argu-

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[5] While petitioner purports to be unable to understand this conclusion of the Secretary (Pet. 10), the Secretary's decision makes it perfectly clear:

> "In December, 1956, having filed its survey plat showing sections, Continental applied for and was given permission to drill the Davis No. 1 Well. This well was a producer by March, 1957, and it was not until August, 1957, that Continental submitted its survey plat by metes and bounds. * * *" (J.A. 45).

ment which they believed should be considered by the Secretary in passing upon petitioner's claim. No contention has been made by petitioner that this informal procedure was not sufficient and that a formal evidentiary hearing should have been instituted. Indeed, while petitioner originally requested "a hearing" before the Commissioner of Indian Affairs (J.A. 62), that request was withdrawn by petitioner before the Commissioner's decision issued. (J.A. 91). The only other procedural request made by petitioner was for oral argument before the Secretary, a request that was granted. (J.A. 46).

This is not a case, therefore, where the facts are developed by testimony under oath and cross-examination and where, according to the authorities cited by petitioner, the administrator is precluded from relying on facts not so developed. Here, where no evidentiary hearing was held, neither the Secretary nor the reviewing courts were compelled to disregard the factual material submitted informally to the Secretary. Compare *First Wisconsin Bankshares Corp.* v. *Board of Governors,* 325 F.2d 946 (7th Cir. 1963); *Northwest Bancorporation* v. *Board of Governors,* 303 F.2d 832 (8th Cir. 1962).

Moreover, petitioner has not shown how it could have been in any way prejudiced by the fact that what it calls "interoffice memos" were included in the file on the basis of which the Secretary made his decision. (Pet. 11). Generalities aside, petitioner complains of the statement in the Secretary's decision that it was recognized that the official survey of township boundaries would permit the individual lease boundaries to be located and of the fact that a passage in a document before the Secretary, not referred to in his opinion,

indicated that it was recognized, before the survey was undertaken, that there would be discrepancies in some of the leases between the section and metes and bounds descriptions.

It is perfectly clear, however, that there can be no real dispute as to the basic facts involved, and that petitioner could not conceivably have been prejudiced by the action of which it complains. There can be no dispute that the official Bureau of Land Management survey was conducted "under special instructions for Group 386, Utah, dated July 28, 1953"; the survey plat so states. (J.A. 163). There can be no dispute that the instructions contained in the record are those referred to on the survey plat. (J.A. 159). There can be no dispute that these instructions reveal that "the purpose of the work is to provide official township boundary surveys to facilitate subsequent identification of individual leases on the ground" and that there would be discrepancies in some of the leases.[6] (J.A. 160). Finally, there can be no dispute that petitioner was one of the companies that paid for the survey; petitioner so acknowledged in its Complaint in this action. (J.A. 12).

Of course, these facts were not proven in any formal sense, but none of the facts relied on by the Secretary was so proven. The dispute was resolved in an informal manner by the Secretary. Petitioner did not, dur-

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[6] Petitioner states that "Presumably the inference is that these anticipated discrepancies were clearly brought to the attention of the companies and there were no complaints." (Pet. 13). There is nothing in the decision of the Secretary which remotely suggests that he drew or relied upon any such inference. Indeed, there is no reference whatever in the Secretary's opinion to "anticipated discrepancies."

ing the course of the administrative proceedings, demand a formal evidentiary hearing and it may not be heard now to say that such a hearing was required. *See, e.g., United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33.

CONCLUSION

For the foregoing reasons the Petition should be denied.

Respectfully submitted,

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